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08-44 No. ___

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IN THE

Supreme Court of the United States

IN RE: THE MARRIAGE OF
DEBORAH ORLANDO COONEY, F/K/A ORLANDO,
Petitioner,

v.

LORENZO ORLANDO,
Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, Second District

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state court rule violates the Due Process Clause of the Fourteenth Amendment where the rule precludes the court from exercising its discretion, in the interest of fundamental fairness, to allow an untimely appeal from a court order terminating a parent's liberty interest to the care and custody of her child.

2. Whether a state court rule violates the Due Process Clause of the Fourteenth Amendment "as applied" to the Petitioner Deborah Orlando Cooney where the rule precludes the court from exercising its discretion, in the interest of fundamental fairness, to allow an untimely appeal from a court order terminating her liberty interest to the care and custody of her child.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all the parties appearing here and before the Appellate Court of Illinois, Second District.

The Petitioner here and Appellant below is Deborah Orlando Cooney.

The Respondent here and Appellee below is Lorenzo Orlando.

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IN THE

Supreme Court of the United States

No. 07-__

IN RE: THE MARRIAGE OF
DEBORAH ORLANDO COONEY, F/K/A ORLANDO,
Petitioner,

v.

LORENZO ORLANDO,
Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, Second District

PETITION FOR A WRIT OF CERTIORARI

DECISIONS BELOW

The order of the Supreme Court of Illinois denying leave to appeal is reprinted in the Appendix. ("Pet. App.") at 188a. The unpublished opinion of the Appellate Court of Illinois, Second District is reprinted in the Appendix to the Petition. Pet. App. at 92a-141a. The order of appellate court denying Petitioner's motion for rehearing is reprinted in the Appendix. Pet. App. at 160a. The memorandum and decision of the circuit court of Winnebago County, Illinois entered June 20, 2007 is unpublished and reprinted in the Appendix. Pet. App. at 5a-15a.

JURISDICTION

The Appellate Court of Illinois, Second District entered its order on January 7, 2008. On April 9, 2008, the Illinois Supreme Court denied Petitioner's petition for leave to appeal. Pet. App. at 188a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

28 U.S.C. § 2403(b) may apply, as the constitutionality of Illinois Supreme Court Rule 306 is drawn into question. Pursuant to United States Supreme Court Rule 29.4, the Attorney General of Illinois has been served with this petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment provides, in relevant part: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

The relevant provisions the Illinois Supreme Court Rules (Ill. Sup. Ct. R. 306) are reprinted in the Appendix. Pet. App. at 189a-196a.

STATEMENT OF THE CASE

This petition seeks review of a decision of the Appellate Court of Illinois, Second District, from which the Supreme Court of Illinois denied leave to appeal. The important federal question is a parent's basic fundamental rights under the Fourteenth

Amendment. At issue is a state court rule which precludes a reviewing court from exercising its discretion, in the interest of fundamental fairness, to allow an untimely appeal from a court order terminating a parent's liberty interest to the care and custody of her children.

This Court's intervention is required, as several state courts of last resort have decided this important federal question differently and are in conflict.

A. Factual Background.

On June 15, 1998, the circuit court of Winnebago County, Illinois, granted a divorce to the Petitioner Deborah Orlando Cooney ("Deborah") and the Respondent Lorenzo Orlando ("Lorenzo"). Pet. App. at 94a. Two sons had been born to the marriage. On September 18, 2001, the circuit court issued the final judgment on custody, granting permanent custody to Deborah with visitation for Lorenzo pursuant to a previously entered co-parenting agreement. Pet. App. at 94a. The boys were then 11 and 9 years of age.

On June 14, 2005, the circuit court, in the presence of the parties' attorneys, received the report of a custody investigator, previously appointed pursuant to 750 ILCS 5/605. Pet. App. at 99a. The circuit court then entered a protective order, directing the attorneys not to disclose or discuss the contents of the Report with their clients and ordering both parents and children to be present in court the next day without explanation for the mandate. Pet. App. at 99a-100a.

On June 15, 2005, Lorenzo filed an emergency petition for a temporary change in custody, ostensibly based on the conclusions and recommendations of the investigator's report which, in part, recognized that

Deborah had been the boys' primary caregiver since their births. Deborah was then allowed to read the 33-page report while in court, although the governing statute required the receipt of such reports by the parties at least ten (10) days prior to any hearing. Pet. App. at 100a.

The circuit court granted Respondent Lorenzo's emergency petition for a temporary change of custody which provided that the children have "no contact" with Deborah. Deborah's counsel never informed her of the need to file an appeal of the custody determination within five (5) business days, pursuant to Ill. Sup. Ct. R. 306(b). Pet. App. at 149a. On the day of the appeal deadline, Deborah's attorney served her with his motion to withdraw. Pet. App. at 149a. Deborah subsequently filed an appeal; however, it was deemed untimely. Pet. App. at 120a. As a result of the circuit court's grant of custody to Lorenzo, Deborah was denied visitation with her children for almost two years, prior a formal custody hearing.

In June 2007 – after nearly two years of Deborah having no contact with her children – the circuit court conducted a custody hearing. On June 20, 2007, the circuit court entered a memorandum of decision formally denying Deborah visitation with her children. Pet. App. at 111a. On July 31, 2007, Deborah appealed the circuit court's decision. Pet. App. at 18a.

The appellate court reversed in part and affirmed in part the trial court's ruling, dismissing the heart of Deborah's argument that the patent violation of her due process rights on June 15, 2005 tainted the outcome of the final custody proceeding in 2007. The court stated, "we need not reach the merits of this argument. . . " Pet. App. at 119a. The appellate

court rested its conclusions on Ill. Sup. Ct. R. 306(b)(1), which required that a petition for leave to appeal an order affecting the care and custody of unemancipated minors must be filed within five (5) business days of the entry of the order, and that Deborah failed meet that deadline. Pet. App. at 119a-120a.

This constitutional issue arose for the first time in and as a result of the appellate court's ruling. Pet. App. at 164a-165a. Accordingly, Deborah raised this issue in her motion for rehearing in the appellate court, but the appellate court denied Deborah's motion without comment.

Thereafter, Deborah filed a petition for leave to appeal to the Illinois Supreme Court. In her petition, Deborah argued the unconstitutionality of the rigid application of Ill. Sup. Ct. R. 306(b)(1) stating that the rule: (1) was unconstitutional as it denied Deborah her due process rights under the Fourteenth Amendment as to the care and custody of her children; and (2) was unconstitutional "as applied" to her under the circumstances. Pet. App. at 165a. However, the Illinois Supreme Court denied Deborah's petition for leave to appeal without comment. Pet. App. at 188a.

B. Proceedings Below

On June 15, 2005, the trial court granted Respondent Lorenzo's emergency petition for a temporary change of custody which provided that the children have "no contact" with Deborah. Pursuant to Ill. Sup. Ct. R. 306(a)(5), Deborah filed a petition for leave to appeal the trial court's order granting a temporary change of custody and the no contact order. However, Deborah's counsel failed to timely perfect the appeal. Pet. App. at 119a-120a.

In June 20, 2007, the circuit court of Winnebago County, Illinois entered a Memorandum of Decision formally denying Deborah visitation with her children. Pet. App. at 111a. On July 31, 2007, Deborah appealed the circuit court's decision. Pet. App. at 18a.

The Illinois Appellate Court, Second District issued an order on January 7, 2008, affirming in part, reversing in part and remanding the cause. Pet. App. at 141a. Deborah's petition for rehearing was denied by the appellate court on February 8, 2008. Pet. App. at 160a.

On April 9, 2008, the Illinois Supreme Court denied Deborah's petition for leave to appeal. Pet. App. at 188a.

REASONS FOR GRANTING THE PETITION

I. PARENTS HAVE A FUNDAMENTAL LIBERTY INTEREST IN THE CARE AND CUSTODY OF THEIR CHILDREN.

This Court has recognized parents' fundamental rights to the care, custody and control of their children: "The liberty interest . . . of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). This Court described the rights of a mother "to the care, custody, management and companionship of her minor children" as "[r]ights far more precious . . . than property rights." The right to conceive and to raise children has been deemed "essential." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), *citing Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and has been deemed a "basic civil right of

man." *Stanley*, 405 U.S. at 651, *citing Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

"The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment (*Meyer*, 262 U.S. at 399), the Equal Protection Clause of the Fourteenth Amendment, (*Skinner* 316 U.S. at 541), and the Ninth Amendment (*Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring))." *Stanley*, 405 U.S. at 651.

But, as this Court has noted: "For all its consequence, 'Due process' has never been, and perhaps can never be, precisely defined. '[U]nlike some legal rules,' this Court has said, due process 'is not a technical conception with a fixed content unrelated to time, place and circumstances.'" *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961), *quoting*, *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162-163 (1951).

"Rather, the phrase expresses the requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake." *Lassiter v. Department of Social Services of Durham County, N.C.*, 452 U.S. 18, 24 (1981).

In this case, Deborah's liberty interests with respect to her care, treatment and custody of her minor children are fundamental liberty rights that are afforded constitutional due process protections.

II. SEVERAL STATE COURTS OF LAST RESORT HAVE DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT.

A. State Courts that Allow Untimely Appeals in the Interest of Fundamental Fairness.

Several state courts of last resort have allowed untimely appeals in the interest of fundamental fairness.

Oklahoma: In a divorce case seeking a modification of custody, the Supreme Court of Oklahoma found that "rigid adherence" to a procedural rule was a "particularly egregious abuse of discretion." *White v. White*, 173 P.3d. 78, 80 (Okla. 2007). The Oklahoma Court concluded, "A request for modification of child custody is far too important to be decided essentially by default under the Rules for the District Courts. Those rules were established to facilitate the adjudication of civil disputes, not to impede the presentation of evidence in a child custody dispute." *Id.* at 81.

West Virginia: The Supreme Court of West Virginia, in a divorce case where an attorney failed to file a petition for review within a ten-day deadline, wrote, "This Court said that 'it is generally held that an attorney's negligence will not serve as a basis for setting aside a default judgment on the grounds of 'excusable neglect.'" *Delapp v. Delapp*, 584 S.E.2d 899, 904 (W.Va. 2003). However, the West Virginia court looked to this Court's holding in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993) which found that

"excusable neglect" encompasses situations in which the failure to comply with a filing deadline is attributable to negligence. *Delapp*, 584 S.E.2d at 904, citing, *Pioneer*, 507 U.S. at 394. Following this Court's holding in *Pioneer*, the West Virginia Supreme Court found "excusable neglect" and reversed and remanded the case for review. *Delapp* 584 S.E.2d at 904.

Kansas: In *State v. Ortiz*, the Supreme Court of Kansas, in the interest of fundamental fairness, recognized an exception to the rule conferring jurisdiction on the appellate court only if a timely appeal is perfected, where a criminal defendant either was not informed of his right to appeal or where his attorney failed to perfect and complete an appeal. 640 P.2d 1255, 1258 (Kan. 1982). *In re T.M.C.* extended the fundamental fairness exception as explained in *Ortiz* to civil proceedings – specifically to civil proceedings involving the termination of parental rights. 988 P.2d 241, 244 (Kan.App. 1999). The court stated: "It is well-settled that basic parental rights are fundamental rights protected by the Fourteenth Amendment," and the court held "we conclude it is proper to apply the fundamental fairness exception to an untimely appeal from a termination order." *Id.* at 243.

Utah: In *State v. Johnson*, the Supreme Court of Utah held that an attorney's failure to perfect an appeal was grounds for allowing the appellate court to take jurisdiction over what would otherwise have been an untimely appeal. 635 P.2d 36, 38 (Utah 1981). Thereafter, in *Manning v. State*, the Utah Supreme Court set forth circumstances in which the court could reinstate the time frame for filing an appeal. 122 P.3d 628, 636 (Utah 2005). One such circumstance is where "the court or the defendant's

attorney failed to properly advise defendant of the right to appeal." *Id.*, at 636. The *Manning* court concluded that "the right to appeal may then be restored if it is in the interest of fundamental fairness to do so." *Id.*, at 639.

Arkansas: In *Bryant v. State*, the Supreme Court of Arkansas set forth two possible grounds for allowing the filing of an untimely appeal, where "either the party or attorney filing the appeal is at fault, or there is good reason that the appeal was not timely perfected." 207 S.W.3d 557, 557 (Ark. 2005). In *Bryant*, the attorney filed a motion in which he "candidly admitted fault," and therefore the court allowed the untimely appeal. *Id.*, at 557; *see, also*, *Smith v. Arkansas Dept. of Health & Human Services*, No. 07-1066, 371 Ark. 425, 2007 WL 3197222 (Ark. Nov. 1, 2007) (a termination of parental rights case in which the court allowed an untimely appeal even though the notice of appeal was deficient).

Vermont: The Supreme Court of Vermont, in a case involving the termination of parental rights and an untimely appeal, wrote: "Considering the important rights at stake in this case, the reasons for the mother's untimely appeal, and the fact that the parties have argued the merits of mother's appeal in their briefs, we address the substance of mother's appeal to advance the interests of justice and fundamental fairness." *In re A.D.T.*, 817 A.2d 20, 25 (Vt. 2002).

B. State Courts that Preclude the Court From Exercising Discretion to allow Untimely Appeals.

Minnesota: The Supreme Court of Minnesota, in a case involving the termination of parental rights

where an attorney failed to serve a notice of appeal on a party within 30 days as required by statute, did not excuse the error. The majority wrote: "A good cause exception at the appellate court level would eviscerate the uniform, impartial application of the rules. The rules as a whole are replete with provisions containing definite deadlines specifically 'designed to expedite the final resolution of litigation, with due consideration to fairness and certainty of procedure.'" *In the Matter of J.R.*, 655 N.W.2d 1, 4 (Minn. 2003). Two justices, while concurring in the result, dissented in part, saying: "There are times when we must be able to look beyond procedural rules in order to act in the interests of justice." *Id.* at 6. (Justices Anderson and Page dissenting in part).

Hawaii: The Supreme Court of Hawaii strictly adhered to a twenty-day filing rule in dismissing a mother's appeal of a decision awarding permanent custody of her child to a state agency. *In the Interest of Jane Doe*, 100 P.3d 75 (Haw. 2004). Indeed, the Hawaii Supreme Court took that opportunity to overrule it's own decision in *In re Doe*, 91 P.3d 485 (Haw. 2004) made earlier that same year. The Supreme Court of Hawaii stated: "Consequently, we overrule the jurisdictional holding of *In re John Doe*, reaffirm that a timely motion for reconsideration is a prerequisite to an appeal . . . and hold that, absent compliance with the statute, we lack jurisdiction, and the appeal must be dismissed." *In the Interest of Jane Doe*, 100 P.3d at 77.

Illinois: Pursuant to Ill. Sup. Ct. R. 306(a)(5), a party is permitted to file a petition for leave to appeal a temporary change of custody. *See*, Ill. Sup.Ct. R. 306(a)(5). The timing in which to file such a petition is governed by Ill. Sup. Ct. R. 306(b)(1) which pro-

vides, in relevant part: "The petition, supporting record and the petitioner's legal memorandum, if any, shall be filed in the appellate court within five business days of the entry or denial of the order from which review is being sought. . ." Ill. Sup.Ct. R. 306(b)(1). Furthermore, under Illinois law, a temporary custody order can only be appealed on an interlocutory basis as provided for in the Illinois supreme court rules. *In re Marriage of Kostusik*, 361 Ill.App.3d 103, 108 (Ill.App. Dist. 2005).

C. State Courts that Allow Untimely Appeals in Criminal, but Not Civil Cases.

Illinois: In Illinois, the court has the power to allow a late notice of appeal in criminal cases. *People v. Golden*, 369 Ill.App.3d 639, 645 (Ill. App. Dist. 2006). A late notice of appeal may be filed in a criminal case in Illinois "to promote the concept of fundamental fairness." *People v. Perez*, 115 Ill.App. 3d 446, 451 (Ill. App. Dist. 1983).

Unlike criminal cases, Illinois state courts have no discretion to allow untimely filed appeals in civil cases, including cases that affect a parent's fundamental right to the care and custody of her children. Ill. Sup. Ct. R. 306 provides that an appeal from an order concerning the care and custody of minors must be filed with appellate court within five (5) business days, rather than the usual thirty (30) day deadline to appeal other final orders. *See* Ill. Sup. Ct. R. 306(b)(1). Thus, in Illinois there is a dichotomy in allowing appeals in criminal but not civil cases, even though fundamental liberty interests are at issue in both criminal cases and in civil cases terminating parental rights.

D. The Federal Courts And State Courts Allow For Extensions Due to Excusable Neglect.

Federal Rule of Appellate Procedure 4(a)(5) permits the district court to extend the time for filing an appeal in a civil case if the party seeking the extension shows excusable neglect or good cause. Fed. R. App. P. 4(a)(5)(ii). A party may make a motion for an extension before the time for appeal has run or within a thirty-day grace period after the time for appeal has expired. Fed. R. App. P. 4(a)(5)(i).

The good cause standard applies in situations where the delay was not due to fault, excusable or otherwise. Traditionally, the excusable neglect standard is applied in situations where there is fault or the delay is within the control of the movant.

This Court in *Pioneer Investment Services v. Brunswick Associates* moved beyond the "excusable neglect" standard and adopted a "flexible standard" that takes into account all of the relevant circumstances. 507 U.S. 380, 395 (1993). Such circumstances include: "the danger of prejudice to [the nonmoving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Id.* at 395. This Court held that "excusable neglect is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence." *Id.* at 394. Furthermore, the determination of whether failure to abide by a specified time limit constitutes excusable neglect is an equitable one. *Id.* at 395.

Although *Pioneer* was based on bankruptcy law, its excusable neglect standard has been adopted by a majority of the federal circuits as the proper standard for district courts to apply when exercising discretion of whether to extend the time to appeal a civil case under Rule 4(a)(5).[1]

Moreover, several states have enacted rules that are similar to Rule 4(a)(5) and allow the trial court to extend the time for appeal under a showing of excusable neglect.[2] Furthermore, Colorado allows its appellate courts to extend the time for appeal (Colo. R. App. P. 4(a)), while Pennsylvania allows late appeals in instances of non-negligence. *Bass v. Commonwealth*, 401 A.2d 1133, 1135 (Pa. 1979).

E. This Court Must Intervene In Order To Address The Conflict Among Courts of Last Resort Concerning This Fundamental Federal Question.

In this instance, the federal courts and numerous state courts allow for untimely appeals under the rubric of excusable neglect. The rule in Illinois that

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[1] *See, e.g., Halicki v. Louisiana Casino Cruises, Inc.*, 151 F.3d 465, 469 (5th Cir.1998); *Prizevoits v. Indiana Bell Tel. Co.*, 76 F.3d 132, 134 (7th Cir. 1996); *Thompson v. E.I. Dupont de Nemours & Co.*, 76 F.3d 530, 533 (4th Cir. 1996); *Advance Estimating Sys., Inc. v. Riney*, 130 F.3d 996, 997-98 (11th Cir. 1996); *Virella-Nieves v. Briggs & Stratton Corp.*, 53 F.3d 451, 454 (1st Cir. 1995); *Fink v. Union Cent. Life Ins. Co.*, 65 F.3d 722, 724 (8th Cir. 1995); *Reynolds v. Wagner*, 55 F.3d 1426, 1429 (9th Cir. 1995); *Weinstock v. Cleary*, 16 F.3d 501, 503 (2d Cir. 1994); *City of Chanute v. Williams Natural Gas Co.*, 31 F.3d 1041, 1046 (10th Cir. 1994).

[2] *See, e.g.*, D.C. Ct App. R. 4(a)(4); Haw. R. App. P. 4(a)(5); Me. R. App. P. 2(b)(3); Miss. R. App. P. 4(g); Mont. R. App. P. 4(6); N.M. R. App. P. 12-201(E)(2); N.D. R. App. P. 4(a); R.I. Sup.Ct. Art. 1, R. 4(a); Utah R. App. P. 4(e); Vt. R. App. P. 4.

precludes a court from exercising discretion to hear an untimely appeal violates parents' fundamental rights with respect to the care and custody of their children, and the rule is in conflict with numerous other jurisdictions. Although a parent may have a civil suit against her attorney for failing to perfect an appeal, an action for attorney malpractice is a wholly inadequate remedy for the violation of a fundamental liberty interest.[3]

Just as this Court in *Pioneer* adopted a "flexible standard" that takes into account all of the relevant circumstances, this Court should extend this flexible standard to state courts when the termination of parental rights is at issue. Illinois' rigid approach violates the Petitioner's constitutional rights and must be remedied.

III. ILLINOIS SUPREME COURT RULE 306(b)(1) IS UNCONSTITUTIONAL "AS APPLIED" TO DEBORAH, AS IT INTERFERED WITH HER FUNDAMENTAL LIBERTY RIGHT IN THE CARE AND CUSTODY OF HER CHILDREN.

When a litigant claims that a statute is unconstitutional "as applied" to her, and the statute is in fact

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[3] *See In re AK.V.*, 747 A.2d 570, 576-77 (D.C. 2000) (stating that the usual remedy of money damages in a civil case for misfeasance or nonfeasance of counsel is "wholly inadequate in a neglect case"); *In re K.L.*, 91 S.W.3d 1, 11 (Tex. Ct. App. 2002) (stating that money damages are inadequate in termination cases where the effect of counsel's deficiencies may be irrevocable). In presenting its holding, the court in *K.L.* cited to *Santosky v. Kramer*, 455 U.S. 745, 759 (1982) for the proposition that termination of parental rights cases differ from other civil cases in that once affirmed, the result is final and irrevocable. *K.L.*, 91 S.W.3d at 11.

unconstitutional as applied, the Court normally invalidates the statute only as applied to the litigant in question. *U.S. v. Booker*, 543 U.S. 220, 314 (2005). The Court does not strike down the statute on its face. *Id.*

In *Troxel v. Granville, supra*, this Court held a Washington state statute unconstitutional "as applied" in that the statute allowed the state court to infringe upon a parent's fundamental right to make child-rearing decisions by ordering visitation to a non-parent. This Court stated that "[t]he liberty interest in this case – the interest of parents in the care, custody, and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court." 530 U.S. at 65-66. This Court went on to rule that the combination of several factors "compels our conclusion that [the Washington statute], as applied, exceeded the bounds of the Due Process Clause." *Id.* at 65-69.

An analogous case is *Lulay v. Lulay*, 739 N.E.2d 521 (Ill. 2000), in which the Illinois Supreme Court found section 607(b)(1) of the Illinois Marriage and Dissolution of Marriage Act unconstitutional as applied to the facts of that case, as it was an unconstitutional infringement on the parents' fundamental liberty interest in raising their children. 739 N.E.2d at 534.

Looking at the specific facts of this case, Ill. Sup. Ct. R. 306(b) is unconstitutional as applied to Deborah, as it infringed on her fundamental liberty interest in the care and custody of her children.

On June 15, 2005, without a hearing and in violation of Illinois law, the trial court granted Lorenzo's emergency petition for a temporary change

of custody, further providing that there be "no contact" with Deborah, even though she had been the children's primary caretaker since their births. Pursuant to Ill. Sup. Ct. R. 306(a)(5), Deborah was permitted to file a petition for leave to appeal the temporary change of custody and the no contact order. The timing in which to file her petition was governed by Ill. Sup. Ct. R. 306(b)(1) which provides, in relevant part: "The petition, supporting record and the petitioner's legal memorandum, if any, shall be filed in the appellate court within five business days of the entry or denial of the order from which review is being sought . . ." Thus, pursuant to Ill. Sup. Ct. R. 306(b)(1), Deborah's petition for leave to appeal was to be filed in the appellate court on or before June 22, 2005. However, Deborah's counsel, Mr. Alex Abate, failed to timely perfect the appeal. Pet. App. at 119a-120a.

Instead, on June 22, 2005 – the day the petition for leave to appeal was due – Mr. Abate served Deborah with his Motion to Withdraw as Deborah's counsel. One week after the appeal deadline – on June 29, 2005 – Mr. Abate filed his Motion to Withdraw, which the trial court granted on that same day. Pet. App. at 149a.

In granting Lorenzo's emergency petition for a temporary change in custody and entering the no contact order, the circuit court clearly erred in taking Deborah's children away without any notice, hearing or findings whatsoever. Even the appellate court noted that no testimony or evidence was taken at the June 15, 2005 "hearing." Pet. App. at 100a. Fundamental fairness dictates the reinstatement of Deborah's right to appeal the order and its resulting impact on the subsequent June 2007 hearing, as such

a rigid application of Ill. Sup. Ct. R. 306(b)(1) is unconstitutional as applied to Deborah under these circumstances.

CONCLUSION

For the reasons stated, the Court should grant this petition.

Respectfully submitted,

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